



Notre Dame Law Review

Volume 46 | Issue 3

Article 1

3-1-1971

Integer Vitae: Independence of the United States Commission on Civil Rights

Theodore M. Hesburgh

Follow this and additional works at: <http://scholarship.law.nd.edu/ndlr>



Part of the [Law Commons](#)

Recommended Citation

Theodore M. Hesburgh, *Integer Vitae: Independence of the United States Commission on Civil Rights*, 46 Notre Dame L. Rev. 445 (1971).
Available at: <http://scholarship.law.nd.edu/ndlr/vol46/iss3/1>

This Article is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

INTEGER VITAE: INDEPENDENCE OF THE UNITED STATES COMMISSION ON CIVIL RIGHTS*

Theodore M. Hesburgh, C.S.C.**

I. Introduction

"Racism began as rationalization" says C. T. Vivian.¹ Similarly, more than twenty-five years ago, in his classic work, *An American Dilemma*, Gunnar Myrdal explained his theory of the reason for the development of American "racism":

The race dogma is nearly the only way out for a people so moralistically equalitarian, if it is not prepared to live up to its faith. . . . *The need for race prejudice is, from this point of view, a need for defense on the part of the Americans against their own national Creed, against their own most cherished ideals.*²

While there undoubtedly are other explanations for this dark and complex phenomenon, it is clear, as Vivian and Myrdal point out, that the existence of an unassimilated racial minority, segregated by law, custom and economic status, has created so great a moral dilemma for the United States that it has been necessary to invent myths to justify discrimination—myths which, while they have varied from period to period, resemble each other in their essential fallaciousness. We have thus heard about "natural inequality," "preference for segregation" and other rationalizations to explain and defend what all along has been essentially indefensible.

These myths, as they took root, became themselves an added obstacle to reform, for although they were false, they took on the trappings of indisputable fact. Creation of the United States Commission on Civil Rights in 1957 as an impartial civil rights factfinding agency was a first step in treating one of the potent sources of racism. Through careful investigation of the facts concerning civil rights, the myths would be stripped away and America would be forced to face squarely the moral dilemma which it had avoided for generations.

The link between racism and distortion of the truth is one reason why, in an age of political activism, a factfinding body such as the Commission continues to be relevant and necessary. The slow progress of civil rights in the United States has not been steady. It has, rather, been a cyclical movement in which periods of progress have been followed by longer periods of reaction. In each of these less hopeful periods, the falsehoods, the rationalizations and the self-deceptions have reappeared in new—or not-so-new—forms. As long as minority persons do not achieve complete equality, the public and its elected representatives will be

* The author wishes to thank Mrs. Sophie Eilperin, a member of the staff of the U.S. Commission on Civil Rights, who was enormously helpful in connection with the preparation of this article. The comments of Commissioners Rankin and Horn are also gratefully acknowledged.

** President, University of Notre Dame du Lac. Chairman, United States Commission on Civil Rights.

1 C. VIVIAN, *BLACK POWER AND THE AMERICAN MYTH* 6 (1970).

2 G. MYRDAL, *AN AMERICAN DILEMMA*, 89 (1944).

tempted to resort to deception rather than respond to their claims. The angry protests over busing in Southern communities, when in fact children were bused for decades to achieve segregation in public schools, are just one recent example of the self-deception engendered by prejudice. It has been the Commission's main function to state the facts as they are—not as some would like them to be—to allow no self-deceptions or comfortable rationalizations for inequality to intervene.

One might ask: "But isn't the Commission a part of the federal establishment?" Why, then, should it be any more truthful than other establishment agencies which helped to create and perpetuate the myths upon which racial discrimination is based? Admittedly, the Commission is a small, almost powerless agency. It has not won the great victories of the civil rights movement—those belong to the Blacks, Chicanos and Indians (and their allies, when they had any) who fought for them. In defeat, the Commission was powerless to turn the tide. Nonetheless, by maintaining an independence and integrity the Commission has demonstrated a consequent willingness to approach civil rights problems honestly—even if its vision is limited and fallible. This is in itself of important political value. It insures that among competing opinions, interests and pressures the existence of certain unpleasant facts will not be totally ignored. There is a strength and stability in facts. Especially in the area of civil rights, where emotion so often predominates over reason, facts are essential to progress. Discovering these facts has been the Commission's main function.

II. Early History

Of course, "independence" is only a relative term. All agencies have a large degree of independence, whether or not they are supervised by cabinet officers, but no agency is fully independent. Agencies in the executive departments and so-called independent agencies are about equal in the extent to which they can be brought under congressional supervision; the difference has to do only with presidential supervision.³

From the beginning, the Commission on Civil Rights⁴ has been considered an "independent" agency, although the word does not appear in the Civil Rights Act of 1957 which established the Commission as an agency "in the executive branch of the government."⁵ The Act did endow the Commission with bipartisanship, one of the attributes of independence. If no more than three of the six Commissioners can be members of the same party,⁶ the President is not expected to control the Commission. Bipartisanship was further strengthened in 1964 by an amendment providing that even Commission subcommittees shall be nonpartisan.⁷

3 1 K. DAVIS, *ADMINISTRATIVE LAW TREATISE*, § 1.03 n.17 at 21 (1958).

4 For a history of the Commission from its inception to the mid-sixties see F. DULLES, *THE CIVIL RIGHTS COMMISSION: 1957-1965* (1968). See also C. AKINS, *COMMISSION ON CIVIL RIGHTS: RACIAL INJUSTICE AND PUBLIC POLICY* (1969 draft in Commission files).

5 42 U.S.C. § 1975(a) (1964).

6 *Id.* § 1975(b).

7 The Civil Rights Act of 1964 provided that upon authorization by the Commission, hearings may be held by any subcommittee of two or more Commission members, "at least one of whom shall be of each major political party." 42 U.S.C. § 1975(f) (1964).

In addition to bipartisanship, there are other factors that make for the independence of federal agencies: lack of presidential power to discharge without cause, appointments for fixed terms which may extend beyond the term of the President, and the "tradition that the President should not interfere in some types of business of the so-called independent agencies."⁸ Although only the last of these three prerequisites for independence is clearly present in the Commission's case, it has also been argued that the Commissioners have fixed terms which are coterminous with the life of the Commission.⁹

The Eisenhower administration proposal, which became the Civil Rights Act of 1957, called for a bipartisan, executive Commission. Attorney General Brownell, in transmitting the bill to the House of Representatives, explained that:

The executive Branch of the Federal Government has no general investigative power of the scope required to undertake [a study of allegations of denials of constitutional rights of Negroes]. The study should be objective and free from partisanship. It should be broad and at the same time thorough.¹⁰

The source of the proposal was the 1947 report of the President's Committee on Civil Rights (the Truman Committee) which recommended the establishment of a permanent Commission on Civil Rights in the Executive Office of the President and the simultaneous creation of a Joint Standing Committee on Civil Rights in the Congress.¹¹ President Truman sent a civil rights bill to Congress in 1948 calling for both of these measures, but it failed to pass. In the 1956 and 1957 civil rights bills sent to Congress by President Eisenhower, only an executive commission was proposed. Senator Paul Douglas, one of the legislation's sponsors, explained that fear of Southern resistance led to abandonment of the "Congressional Committee" proposal.¹² That abandonment probably gave rise, however, to the idea of a bipartisan rather than a purely "executive" commission. The influence of the Joint Congressional Committee concept might also explain why the Commission was required to report to the Congress as well as to the President.¹³

In the debates on the bill, the Eisenhower administration sought to disassociate its only "civil rights agency," the Department of Justice, from the proposed Commission. As Attorney General Brownell explained:

What we have in mind for the Commission to do would be to find out, for example, whether the practices, under the election laws would, in fact, the way they are operated, violate civil rights of our citizens. *For the law-*

8 1 K. DAVIS, *supra* note 3.

9 See text accompanying notes 28-35 *infra*.

10 1957 U.S. CODE CONG. & AD. NEWS 1978.

11 U.S. PRESIDENT'S COMMITTEE ON CIVIL RIGHTS, TO SECURE THESE RIGHTS 154 (1947).

12 *Hearings on S.83 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 85th Cong., 1st Sess., at 119 (1957).

13 42 U.S.C. § 1975c(b) (1964). This requirement is not unique to the Commission. At present such agencies as the Public Land Law Review Commission, the National Advisory Council on the Education of Disadvantaged Children, the Joint Commission on the Coinage and others report to the President and to Congress. UNITED STATES GOVERNMENT ORGANIZATION MANUAL, 1970-71, at 537-57 (1970).

*enforcement agency to do that, of course, would be more or less turning it into a national police . . . and that we are very anxious not to do.*¹⁴

The remainder of the 1957 debates and the sole committee report on the Act¹⁵ do not shed further light on the issue of the Commission's independence. The real controversy in the 1957 Civil Rights Bill involved strengthening civil rights remedies, not the creation of the Commission. Even in the discussions on the Commission, the most debated point was not its independent status but its possession of the subpoena power. Looking back on the context in which the Commission was created, it can be fairly said that the principal reason for establishing a bipartisan investigative agency was to appease public pressure for a civil rights bill without inviting defeat of a stronger proposal.

The first clear legislative statements concerning the Commission's independence were made during my own confirmation hearing. Senator James Eastland questioned me concerning the Commission's jurisdiction to inquire into events such as the school disturbances following integration in Little Rock, Arkansas. I replied:

I would think unless the Commission by some higher authority were called into this, that we would be unlikely to go into it by our own judgment.¹⁶

Chairman Eastland pounced on that reply:

Well, now, some higher authority. What higher authority could call you in? Father Hesburgh: I do not know, sir.

Chairman Eastland: They could not cause you to go beyond your duties, could they?

Father Hesburgh: I would not think so, Senator.

Senator McClellan: May I inquire, Mr. Chairman, who would have the authority to call them into it?

Chairman Eastland: *No one that I know of.*

Senator McClellan: That is what I am wondering. *This Commission, when established, becomes its own boss.* I do not think anybody has any authority to call you in to give you instructions. . . .

Father Hesburgh: I did not know that, sir.

Senator McClellan: I think you ought to know that. *I thought this was to be an independent commission.*

Chairman Eastland: *That was the congressional intent, but you know those things are forgotten at times.*

Senator McClellan: I did not think there was any question about that. I did not know anyone had any idea someone could give them instructions what to do.¹⁷

When John Hannah, then President of Michigan State University, who had been nominated for Chairman, was questioned, Chairman Eastland again brought up this point:

14 *Hearings on S.83, supra* note 12, at 13-14.

15 H.R. REP. NO. 291, 85th Cong., 1st Sess. (1957).

16 *Hearings on Confirmation of Members of the U.S. Commission on Civil Rights Before the Senate Comm. on the Judiciary*, 85th Cong., 2d Sess., at 9 (1958).

17 *Id.*

Now, are you subject to the instructions of some high authority, now as a member of this Commission, as the Chairman?

Mr. Hannah: No, sir.¹⁸

III. The Commission and the Justice Department

The debate between Senator Eastland and Dr. Hannah at the confirmation hearings touched on a problem which was to arise again throughout the subsequent years—namely, the relationship between the Commission and the Department of Justice. It was natural that the executive department with the broadest responsibilities in the field of civil rights at that time should be the agency with the most frequent contacts with the Commission and most likely to test the Commission's independence.

The original discussions of this relationship centered around Southern fears of the use of the "Commission as a factfinding body for the benefit of the Department of Justice."¹⁹ This fear of Justice Department zeal is evident in the extreme delays that preceded the confirmation of the first Assistant Attorney in charge of the Civil Rights Division, W. Wilson White.²⁰ Chairman Hannah's promise to the Senate Judiciary Committee during his confirmation hearing to operate completely separate from the Department of Justice²¹ was scrupulously obeyed during the Commission's early investigations. Thus, for example, on March 20, 1959, Attorney General Rogers testified in support of Title III of the future Civil Rights Act of 1960 which proposed measures to preserve voting records and to give the Department of Justice power to compel their production. The same day, the Commission's Staff Director, Gordon Tiffany, testified that the Commission had been successful in obtaining some Alabama voting records which the Justice Department could not obtain. Nevertheless, the records were not made available to the Department.²²

The problem of making information gathered by the Commission available to the Department became moot as the Justice Department's jurisdiction over civil rights was expanded to include extensive investigations. Furthermore, in recent years the Commission has cooperated actively with Justice, often forwarding transcripts or other materials to the Department for appropriate action. Southern fears of attempts by the Department to interfere with the Commission's independence in order to increase the Department's power were unjustified; if anything, the Department attempted to restrain the Commission's zeal. One commentator summarizes the early clashes which occurred in 1959:

The basic issue was conflict between the tendency of the Department of Justice to move slowly and the desire of the Commission for more vigorous

18 *Id.* at 18-19.

19 *Id.* at 19.

20 Although the Civil Rights Commission and the Civil Rights Division of the Department were established at the same time by the 1957 Act, the Commission became fully operational on May 14, 1958, with the confirmation of Gordon Tiffany as Staff Director, while W. Wilson White was not confirmed until August 18. CONG. Q. SERV., *REVOLUTION IN CIVIL RIGHTS* 41 (4th ed. 1968).

21 *Hearings on Confirmation, supra* note 16, at 18-19.

22 *Legislative History of Title III, 1960 Civil Rights Act* (December 5, 1962) (memorandum in Commission files).

measures. Justice felt that the Commission sometimes acted irresponsibly and interfered with its own legal efforts to enforce existing legislation; the Commission believed Justice to be timid and overcautious in bringing voting rights suits.²³

The situation was complicated by the fact that although the Commission insisted on a wholly independent status, it had to call upon the Attorney General for enforcement of its subpoena power and had to resort to suit to inspect voting records in the South. During this same period, the constitutionality of the Commission's procedures was also under litigation²⁴ and the Commission was represented by Justice Department attorneys.

At the start of the Kennedy Administration, the Commission's relationship with Justice improved. For example, the White House included the Commission with Justice in a "subcabinet" committee on civil right.²⁵ The Commission's 1961 *Justice* report,²⁶ however, contained extensive criticisms of the Department's efforts in prosecuting illegal actions by policemen. The report also was critical of the FBI, and J. Edgar Hoover defended his agency against the Commission's charges that FBI agents were less than enthusiastic in investigating civil rights complaints. He wrote to Chairman Hannah: "I strongly resent any implication that there is any reluctance or lack of enthusiasm in fulfilling our investigative responsibilities in this important area."²⁷ He demanded the names of persons who could prove the Commission's allegations, but the Commission declined to supply the FBI with the names of confidential informants. The dispute finally died down without any real resolution.

The most serious conflict between the Commission and the Department arose over the Commission's proposed voting hearings in Mississippi. Three times the Commission planned hearings, and three times Justice forced their postponement.²⁸ By 1962, the Commission had heard constant and serious allegations of voting discrimination in the state, as well as allegations of increasingly violent intimidation of Negroes and civil rights workers. The Commission decided to hold hearings. Justice, however, claimed that a Commission hearing would prejudice voting litigation in the South as well as the criminal contempt proceedings it was bringing against Governor Barnett. Reluctantly, on January 2, 1963, the Commission agreed to postpone the hearing.²⁹

On March 21, 1963, at a press conference, President Kennedy was asked whether the Commission had an obligation to yield to the Attorney General. He replied:

No, that is a judgment the Civil Rights Commission should—any time, any hearing they feel advances the cause or meets their responsibility which has been entrusted to them by the law, then they should go ahead and hold it.³⁰

23 F. DULLES, *supra* note 4, at 89.

24 The constitutionality of Commission hearing procedures was upheld in *Hannah v. Larche*, 363 U.S. 420, 440 n.16, 442 (1960).

25 F. DULLES, *supra* note 4, at 110.

26 U.S. COMMISSION ON CIVIL RIGHTS, *JUSTICE* 59-62 (1961).

27 F. DULLES, *supra* note 4, at 149.

28 *Id.* at 179.

29 *Id.* at 180.

30 *Id.* at 180-81.

The President's statement did not deter the Attorney General, who continued to oppose the hearing. While the Commission "thought it advisable to obey his command,"³¹ it nonetheless felt compelled to issue an interim report on conditions in Mississippi.³²

The final round of the battle over the Mississippi hearings came in 1965. The Commission, with what appeared to be the approval of Attorney General Katzenbach and Assistant Attorney General Burke Marshall, completed elaborate preparations for a hearing on voting and law enforcement problems in five Mississippi counties.³³ A hearing date already had been set for February 10, 1965, when Attorney General Katzenbach suddenly asked for a postponement of the hearing. His reason was that it would prejudice the Department's prosecution of the slayers of three civil rights workers in Philadelphia, Mississippi. The Attorney General appeared personally at the next Commissioners' meeting on January 28, 1965. "At a tense session, during which the coals of earlier disputes were raked over somewhat acrimoniously, the Commission members stubbornly resisted the Attorney General's arguments . . . then unanimously decided to hold the hearing."³⁴ Although the hearing was held more than two years later than the Commission had originally planned, the fact that it took place at all was a significant assertion of the Commission's independence—an assertion that found its reward in the success of the hearing and the role the Commission was able to play in supporting the Voting Rights Act of 1965.³⁵

The Commission has continued its role as critic and monitor of the Department's enforcement of civil rights laws. For example, the most recent of the Commission's reports on the administration of justice³⁶ recommended more effective federal remedies against civil rights violations by local law enforcement officers and more vigorous utilization of existing remedies by the Department of Justice. In regard to voting, the Commission's 1968 report on political participation³⁷ sought to broaden federal commitment to black political activity in the South. These efforts were continued in 1970 when Congress debated extension of the Voting Rights Act of 1965; at the hearings, the Commission testified in favor of the bill which eventually became law.³⁸

IV. The Commission and the President

A. Staff Appointments

The Civil Rights Act of 1957 provides that the President shall appoint the Staff Director after consulting with the Commission.³⁹ This indicated that

31 *Id.*

32 U.S. COMMISSION ON CIVIL RIGHTS, INTERIM REPORT ON MISSISSIPPI (April 16, 1963) (on file at Commission).

33 F. DULLES, *supra* note 4, at 233.

34 *Id.* at 234-35.

35 42 U.S.C. § 1973 (1964).

36 U.S. COMMISSION ON CIVIL RIGHTS, MEXICAN AMERICANS AND THE ADMINISTRATION OF JUSTICE IN THE SOUTHWEST 91-92 (1970).

37 U.S. COMMISSION ON CIVIL RIGHTS, POLITICAL PARTICIPATION (1968).

38 Voting Rights Act Amendments of 1970, 91-285, 84 Stat. 314 (June 22, 1970) (codified in 42 U.S.C.A. 1973, 1973b, 1973c, 1973aa-1973bb—4 [1970]).

39 42 U.S.C. § 1975d(a) (1964).

Congress expected the Commissioners to have some voice in the choice of their principal executive officer. The Congress provided that other employees shall be appointed under the "civil service and classification laws" which are applicable to most civilian employees of the executive branch.⁴⁰

The Commissioners throughout the years have tended to increase their influence in the choice of Staff Director. At his confirmation hearing when the Commission's independence was discussed, Commissioner Hannah told the Senate Judiciary Committee that he had called the Attorney General, William P. Rogers, for suggestions on candidates for the post of Staff Director and the latter's "quick response" was "that he thought it would be a serious mistake if there was any relationship between the Attorney General's office and the Commission."⁴¹ The first Staff Director, however, Gordon Tiffany, former Attorney General of New Hampshire, was selected principally by the White House. The Commissioners' role was the essentially passive one of raising no objection to his nomination. They played a more active role, however, in the selection of subsequent Staff Directors. Tiffany's successor, Berl Bernhard, was a member of the Commission's staff and had been named Acting Staff Director by President Eisenhower at the Commission's request. When President Kennedy took office, Chairman Hannah made Bernhard's appointment "a virtual condition" for his own continuance as Chairman,⁴² and President Kennedy submitted his name to the Senate. Similarly, William L. Taylor was promoted in 1965 from General Counsel to Staff Director at the request of the Commissioners. The present Staff Director, Howard A. Glickstein, was chosen by the Commissioners, and in 1969 President Nixon submitted his name to the Senate which confirmed the appointment.

B. Reports

During President Kennedy's term, the Commission became convinced that conditions in Mississippi had deteriorated to the point where action was needed even though plans for a hearing had been postponed. In 1963 a mounting wave of violence against Negroes and civil rights workers seemed to produce no reaction on the part of state law enforcement officials. The Commissioners decided to issue an interim report on these conditions which would set forth the violations of the Constitution which had been perpetuated in Mississippi and which would recommend that the President and Congress consider withholding federal funds being used to enforce segregation.⁴³

Since it was bound to create controversy, the Commissioners decided to send the report to President Kennedy for review before publication, with the understanding that if he did not release it, the Commission nonetheless would publish it. Chairman Hannah and Staff Director Bernhard met with the President, who seemed very unhappy about the proposed report. He asked whether

40 *Id.* It is interesting to note that among the numerous bills proposing the establishment of the Commission, several contemplated that professional and clerical staff should be subject to vote by a majority of the Commission. Another bill exempted the staff from the Classification Act. *Hearings on S. 83, supra* note 12, at 44, 50, 68, and 72.

41 *Hearings on Confirmation, supra* note 16, at 19.

42 F. DULLES, *supra* note 4, at 101.

43 U.S. COMMISSION ON CIVIL RIGHTS, *supra* note 32.

the Commissioners were unanimous and whether they would insist on publication. The answer to both questions was affirmative. The President then told Hannah and Bernhard:

I still don't like it. If the Commissioners have made up their minds, I presume they will issue the report anyway. I think they are off the track on this one, but I wouldn't try to suppress it. That would be wrong—*couldn't do it anyway. It is independent, has a right to be heard*, but I do wish you could get them to reconsider.⁴⁴

After the Report was published, President Kennedy publicly stated that he did not accept the Commission's view that funds should be cut off from a state to compel compliance with the Constitution. But when he was asked whether he considered withholding funds from the Civil Rights Commission, he replied, "No, I don't. No."⁴⁵

No other report of the Commission was quite as controversial, and generally reports are not submitted to the President for advance review in draft form, although copies are mailed in advance of publication as a matter of courtesy.⁴⁶

C. The Commissioners

The most notable development in the character of the Commission was the fact that almost from the beginning the majority of its members were not political figures. The 1957 Act provided for the terms of compensation of Commissioners who were "otherwise in the service of the Government,"⁴⁷ as well as for those who were not. Thus, it was clearly contemplated that government officials could be Commissioners. Only one, however, has been a federal official—J. Ernest Wilkins, who was Assistant Secretary of Labor while serving as a Commissioner. Justice Stanley Reed, who had retired from the Supreme Court but was serving as a senior circuit judge, was nominated by President Eisenhower to be the first Chairman of the Commission. He withdrew his name, however, partly because he believed that service on the Commission would be incompatible with his obligations as a judge.⁴⁸ This precedent was followed later when Commissioners Hannah and Griswold, upon accepting government positions, resigned from the Commission.⁴⁹ The relative lack of involvement of the Commissioners, as individuals, in the political process undoubtedly has contributed greatly to the independent character of the Commission.

⁴⁴ F. DULLES, *supra* note 4, at 182, quoting from A. SCHLESINGER, *A THOUSAND DAYS* 953 (1965).

⁴⁵ *Id.* at 186.

⁴⁶ One exception was the report on RACIAL ISOLATION IN THE PUBLIC SCHOOLS, which was prepared in response to a specific request by President Johnson. U.S. COMMISSION ON CIVIL RIGHTS, *RACIAL ISOLATION IN THE PUBLIC SCHOOLS* (1967). The only other project "commissioned" by a President was FREEDOM TO THE FREE, prepared for the Centennial celebration of the Emancipation Proclamation. U.S. COMMISSION ON CIVIL RIGHTS, *REPORT TO THE PRESIDENT: FREEDOM TO THE FREE* (1963).

⁴⁷ 42 U.S.C. § 1975b(a) (1964).

⁴⁸ F. DULLES, *supra* note 4, at 18.

⁴⁹ Commissioner Hannah resigned in February of 1969 to become Director of the Agency for International Development; Commissioner Griswold resigned in October of 1967 to become Solicitor-General of the United States.

Commissioners traditionally assumed, however, that, like cabinet officers, they are obliged to tender their resignations to new Presidents. This was done at the inauguration of President Kennedy in 1961 and on the succession and election of President Johnson in November of 1963 and in November of 1964. In 1964, however, the propriety of tendering such resignations was seriously questioned. On November 19, 1964, Howard Rogerson, then Acting Staff Director of the Commission, wrote to the Commissioners to tell them that an aide to President Johnson had requested that the Commissioners submit their resignations purely as a "formality." Rogerson expressed some surprise at this. In his view, the Commission resignations tendered after President Kennedy's assassination did not constitute a binding precedent for the future:

We, of course, have always felt that our Commission was in a somewhat different category because of the character of the agency as bipartisan and temporary, and since the appointments were to part-time posts and probably could be considered as term appointments [for the statutory life]. This did not appear to be the kind of thing one should argue about under the circumstances [of November, 1963].⁵⁰

Rogerson nevertheless recommended the submission of pro forma resignations. One of the Commissioners, Dean Griswold, strongly disagreed:

My own thought, subject to the reaction and advice of others, is that it is a mistake for us to be asked for our resignations, and that it would be a mistake for us to offer them. It would be an acknowledgement that we are not an independent agency, but are merely a part of the Presidential staff, holding office at the pleasure of the President. I do not think that that is either the legal or factual situation.⁵¹

When President Nixon assumed office, four Commissioners did not tender their resignations and two did so for personal reasons. The issue thus remains unresolved, but the fact that a dispute over whether Commissioners serve at the pleasure of the President should even exist is indicative of the independent character this Commission has always sought to maintain. While the legality of a demand for resignation remains in question,⁵² it is clear that the Commission is not simply another executive department or agency.⁵³

50 H. Rogerson, *Memorandum to the Commissioners on Tendering Resignations* (November 19, 1964) (memorandum in Commission files).

51 Letter from Dean Griswold to Howard Rogerson and all Commissioners, Nov. 23, 1964, on file with the Commission.

52 It is generally assumed that the President has extensive power to remove executive officers, even if they are members of "independent" bodies. *Myers v. United States*, 272 U.S. 52 (1926); *Morgan v. TVA*, 28 F. Supp. 732 (1939) *aff'd*, 115 F.2d 990 (6th Cir. 1940), *cert. denied*, 312 U.S. 701 (1941). Theoretically, Commissioners serve "at the pleasure of the President" since Congress has not specified that they shall serve for fixed terms or otherwise limited the power of the President to remove them at will. It has been suggested, however, that Commissioners of the Civil Rights Commission may be among the exceptions to the general rule. Whether an official is so excepted depends on the intent of Congress. In *Wiener v. United States*, 357 U.S. 349 (1958), however, the Court relied on the "functions" of a particular officer to decide that Congress had intended to limit the President's power of removal. 357 U.S. at 353-54. In that case, Congress had established a temporary War Claims Commission for two years, extended it twice and then abolished it. The principal basis for the Court's decision was that the nature of the functions vested in the Commissioners were such as to preclude an intent to give the President the removal power. Thus, on the one hand it

V. The Commission and Other Federal Agencies

There is no agency in the federal establishment quite like the Commission. Although it was created as a temporary agency and originally scheduled to exist for only two years, the Commission has been in business for well over a decade and has achieved a degree of permanence that has been lacking in other commissions established to find facts and make recommendations in civil rights and related areas. The Commission's continuity is a factor of considerable importance. For example, the National Advisory Commission on Civil Disorders produced its monumental report in March, 1968. Since it then went out of existence almost immediately, it was not in a position to follow up on the important findings and recommendations that it made. The Commission on Civil Rights, however, because of its continuing life, has been in a position to act as a steady "burr in the saddle" to the President, the Congress, the federal bureaucracy and others who have the capacity to remedy civil rights denials.

If the Commission is unlike other temporary factfinding bodies, it also is completely different from most permanent agencies of the federal establishment. The Commission enforces no laws; it regulates no industries; it administers no program of grants or loans. In short, it is an agency lacking in the traditional trappings of power. At one and the same time this is a severe weakness of the Commission and one of its most important strengths. The lack of enforcement power is a source of frustration to Commissioners and staff alike. Having uncovered instances of discrimination and inequity, the Commission is powerless to take remedial action, but must call upon other agencies for that purpose. By the same token, however, the Commission's powerlessness has placed it in a position of having no axe to grind and has enabled it to assume an objectivity that agencies with power lack. Because the Commission has no program to defend, it has been able to become an "honest broker" in civil rights.

The Commission's relationship with other federal agencies can be succinctly described as that of critic and commentator. One of the most important functions of the Commission is to "appraise the laws and policies of the Federal Government with respect to denials of equal protection of the laws."⁵⁴ The Commission is one of the very few agencies—public or private—which have developed the knowledge and sophistication to find their way through the labyrinth of federal programs to determine their impact in achieving the goal of equal opportunity.

can be argued that the independent nature of the Commission indicates that Congress meant to preclude the President from exercising a removal power. On the other hand, it can be said that while Congress may have intended the tenure of the first Commissioners to be coextensive with the life of the Commission, it did not intend to grant them a life tenure, and hence the President has the power to remove them.

53 For example, the Commission's budget is subject to review by the Bureau of the Budget, which is one of the President's most effective agencies of control over the executive branch. This review is substantive, as well as financial. In general, however, the examiners have not attempted to influence the program of the Commission and at the latest budget hearing in 1969 they acknowledged that the Commission is "unique." An earlier instance of such recognition involved official comments on pending legislation. In 1966, the Commission was informed by the Bureau of the Budget that, as a bipartisan agency, charged with advising the President and Congress, it was excused from compliance with the Bureau's requirement to obtain clearance for all legislative comments. *Official Comments on Pending Legislation—Procedures To Be Followed* (March 9, 1966) (memorandum in Commission files).

54 42 U.S.C. § 1975c(a)(3) (1964).

It has inquired into such programs as housing, employment, welfare and education, and in most cases it has found inadequacies that serve to deny equal opportunity and perpetuate inequity. The Commission has just completed a massive study of the federal civil rights enforcement effort, dealing with such agencies as the Department of Housing and Urban Development, the Equal Employment Opportunity Commission, the Department of Health, Education and Welfare, the Department of Justice and the Bureau of the Budget.⁵⁵

In its hearings, investigations and reports dealing with various federal agencies and programs, the Commission has focused its attention on determining how these agencies and programs can be made to work better. In short, the Commission has not lost faith in "the system," but has attempted to devise means by which existing institutions can be made truly responsive to the needs of all the American people. In carrying out this function, the Commission necessarily has annoyed and even angered a number of federal agencies. Criticism is not easy to take and critics are not popular. Nonetheless, where necessary, the Commission has not hesitated to criticize.

This is not to say that the Commission's only role in relation to other federal agencies is that of critic. It is at least as important to call attention to progress when it occurs, and the Commission has done this as well. For example, in the past, the Commission has been especially critical of the Department of Agriculture.⁵⁶ Recent changes in Agriculture policies, such as the institution of extensive civil rights training programs for department personnel, however, have been noteworthy, and the Commission has called public attention to them.⁵⁷ By the same token, a recent Commission report dealing with the manner in which the Department of Health, Education and Welfare has carried out its responsibilities under Title VI of the Civil Rights Act of 1964 praised the Department for the structure and mechanisms it developed for this purpose.⁵⁸

The Commission does not, of course, limit its activities in relation to federal agencies to public pronouncements and reports. The staff works on a continuing and informal basis with other federal agencies, constantly monitoring their activities in an effort to improve civil rights performance. While hard but mundane work does not receive headlines, it is nonetheless necessary if lasting changes are to be brought about.

VI. Comparison with Foreign Civil Rights Commissions

Just as discrimination based on race, religion and ethnic origin knows no national boundaries, so a Commission on Civil Rights is not unique to the United States. Generally, however, none of the foreign government bodies exercises the degree of independence and critical appraisal which the United States Commission does. It is interesting to compare the functions of agencies, committees,

⁵⁵ U.S. COMMISSION ON CIVIL RIGHTS, *FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT* (1970).

⁵⁶ See U.S. COMMISSION ON CIVIL RIGHTS, *EQUAL OPPORTUNITY IN FARM PROGRAMS* (1965).

⁵⁷ See U.S. COMMISSION ON CIVIL RIGHTS, *supra* note 55.

⁵⁸ U.S. COMMISSION ON CIVIL RIGHTS, *HEW AND TITLE VI* (1970).

commissions and other government structures⁵⁹ set up by foreign countries to investigate denials of fundamental rights with those of the United States Commission. Canada, for example, established a Royal Commission on Bilingualism and Biculturalism in 1963.⁶⁰ Although recently disbanded,⁶¹ the Royal Commission issued a series of reports focusing on inequalities between French and English speaking citizens.⁶² The investigative approach of the Canadian Commission, which included hearings, was similar to that of the United States Commission,⁶³ although several distinctions in organization were evident. For example, unlike the non-legal staff of the United States Commission, the staff of the Canadian Commission was composed solely of private citizens who, although paid by the Canadian Government, did not become Civil Service employees. India has at

59 At least two foreign government structures — the Swedish Ombudsman and the French Council of State (Conseil D'État) — perform tasks similar to that of the U.S. Commission, but their jurisdiction is much broader than the Commission's and does not focus, as the Commission does, on discriminations based on race, religion, and ethnic origin. The Swedish Ombudsman, an institution used by six countries, is a watchdog of the administrative process, seeking to guarantee its fairness, or its efficiency, or both. Usually the ombudsman is empowered to investigate complaints from aggrieved citizens and to launch independent investigations. For the most part, his power is that of full, open inquiry with attendant rights of examination and access to information. He may make recommendations, publish his findings, and submit annual reports. *See generally* W. GELLHORN, *OMBUDSMEN AND OTHERS; CITIZEN'S PROTECTORS IN NINE COUNTRIES* (1966). Like the ombudsman, the Commission has operated from an independent position in order to criticize the activities of other agencies. Indeed all five of its statutory duties are in one way or another exercises of an ombudsman function. In ferreting out information by field work, interviewing, investigation, and holding hearings, the Commission has done ombudsman work, although the ombudsman is generally acting upon individual complaints. Like the Commission, the ombudsman has no direct enforcement powers and must use his powers of publicity to pressure reform. However, despite similarities, the ombudsman is concerned with far more than problems of race or national origin since his purpose is to ensure the general fairness of the entire administrative system. For a good discussion of how the Commission's jurisdiction might be expanded to encompass an ombudsman role, *see* E. Hendon, *A Federal Ombudsman* (Sept. 1, 1966) (memorandum in Commission files).

In France, and in a number of countries which have borrowed from the French government structure, there is a unique body called the Council of State (Conseil D'État) whose primary functions can be compared to the advisory and watchdog roles of the Commission, although the Council is a large, powerful branch of the French government. The Council has both administrative and adjudicative duties. It renders opinions on all legislation drafted by the government both as to the soundness and constitutionality of the proposed law, and it entertains individual complaints by private citizens against the government. These complaints range from charges of unconstitutional use of power by an administrative authority to claims for money damages. *See generally* Lagrange, *French Council of State (Conseil D'État)*, 43 *TUL. L. REV.* 46 (1968).

60 P.C. 1963-1106. The purpose of the Commission was "to inquire into and report upon the existing state of bilingualism and biculturalism in Canada and to see what steps shall be taken to develop the Canadian Confederation on the basis of an equal partnership between the two founding races, taking into account the contributions made by the other ethnic groups to the cultural enrichment of Canada, and the measures to be taken to safeguard that contribution." *Id.*

61 The Royal Commission was disbanded in 1970. By comparison, the Civil Rights Commission has existed for thirteen years and appears permanent.

62 As a result of the reports of the Commission, a permanent Languages Commissioner has been established under the Official Languages Act of 1969, c. 54, s. 19. Although he has the power to investigate specific complaints, he also has broad powers of investigation. Official Languages Act 1969, c. 54, s. 25. Individual complainants in Canada are investigated and dealt with by human rights committees set up by provincial governments. *See* Tarnopolsky, *The Iron Hand in the Velvet Glove: Administration and Enforcement of Human Rights Legislation in Canada*, 46 *CAN. B. REV.* 565 (1968).

63 Telephone conversation with Mr. Michael Oliver, Director of Research, Commission on Bilingualism and Biculturalism, on July 20, 1970. The Royal Commission did possess the subpoena power, *Inquiries Act*, 3 *R.S. Can.*, c. 154, s. 11 (1952), although according to Mr. Oliver, the prestige of royal commissions makes its use unnecessary. By contrast, the Civil Rights Commission subpoenas all its witnesses. 42 *U.S.C.* 1975d(f)–(g). (1964).

least two government bodies analogous to the United States Commission. A Commissioner for Scheduled Tribes and Castes and his staff constitute a permanent agency established under the Indian Constitution.⁶⁴ Their function is to investigate and report to the President on the workings of constitutional safeguards for these minorities,⁶⁵ much as the United States Commission reports to the Congress and the President.⁶⁶ Performing a complementary function, the Director-General for Backward Classes and his staff are part of the Government's Department of Social Welfare. Their agency formulates legislation for the benefit of the minorities and helps Parliament monitor the legislation's effectiveness,⁶⁷ just as the United States Commission monitors federal programs and legislation in the area of civil rights.⁶⁸

Britain too provides some analogies to the United States Commission. While there has never been a royal commission on discrimination, royal commissions as a governmental form resemble the United States Commission at least in regard to the in-depth, independent quality of their investigations.⁶⁹ Aside from royal commissions, two specific agencies of the British government deal with racial discrimination—the Racial Relations Board and the Community Relations Commission.⁷⁰ Although one author has described the former as a paper lion when compared with our Commission,⁷¹ the Board's responsibilities include the handling and processing of individual complaints, a function we do not perform. The

64 INDIAN CONST., Art. 338. In contrast, the Civil Rights Commission was created by Congress. 42 U.S.C. § 1975(a) (1964).

65 Telephone conversation with Mr. R. R. Motihar, Indian Embassy Information Service, on July 16, 1970.

66 42 U.S.C. § 1975c(b) (1964).

67 Telephone conversation, *supra* note 65. While it is not the specific function of the Civil Rights Commission to draw up legislation, the Commission does comment on proposed bills and offers suggestions or alternatives. In addition, its reports often serve as the basis for legislation.

68 42 U.S.C. § 1975c(a)(3) (1964).

69 See H. CLOKE & J. ROBINSON, ROYAL COMMISSIONS OF INQUIRY 2, 5-6, 11 (1937); see generally, Lockwood, *A History of Royal Commissions*, 5 OSGOOD HALL L.J. 172 (1967). British royal commissions, however, generally lack this subpoena power. Telephone conversation with Mr. Donald Burns, British Embassy Information Service, on July 16, 1970. But see McClemens, *The Legal Position and Procedure Before a Royal Commissioner*, 35 AUS. L.J. 271 (1961) (Australian royal commission given power to subpoena by general legislation); see also note 63 *supra*.

70 Race Relations Act of 1965, 45 HALSBURY'S STATUTES c. 73 (2d ed. cont. vol. 1965). The 1965 Act established the Race Relations Board; the National Committee for Commonwealth Immigrants was also appointed in 1965. Dissatisfaction with the effectiveness of this statute led to a special study of race relations in Britain. This study was carried out by the Political and Economic Planning Organization (P.E.P.) (a private group comparable to the Brookings Institute) and a special committee appointed by the Board. The former issued a report clearly demonstrating the extent of racial discrimination in England, P.E.P., RACIAL DISCRIMINATION IN BRITAIN (1967); the latter proposed new legislation to deal with problems outlined by P.E.P. The result of both studies was the Race Relations Act of 1968, 48 HALSBURY'S STATUTES c. 71 (2d ed. cont. vol. 1968), which strengthened and broadened the 1965 Act, retaining the Race Relations Board, but replacing the N.C.C.I. with the Community Relations Commission. See Hamilton, *Race Relations and the Law in England*, 8 WASHBURN L.J. 167 (1969); BRITISH INFORMATION SERVICES, COMMONWEALTH IMMIGRANTS IN BRITAIN (Monograph No. R. 5775/67, Nov. 1967); BRITISH INFORMATION SERVICES, RACE RELATIONS IN BRITAIN (Factel No. 600, April 7, 1970).

71 "The British Race Relations Board is only a feeble imitation of the United States Commission on Civil Rights. Although the duties of the two bodies are comparable in the main respects, the Commission, in addition to investigating, reporting and serving as a national clearinghouse for information, performs an important role in studying and collecting relevant information and appraising 'the laws and policies of the Federal Government with respect to denials of equal protection of the laws under the Constitution . . .'. Moreover the Commission enjoys compulsive powers and is by the same token bound by its own procedural rules as well as the principles of 'due process.' By comparison the Race Relations Board looks like a

Community Relations Commission's duties, which include holding conferences, providing the public with information, and advising the Secretary of State on matters of racial discrimination, resemble the clearinghouse function of the United States Commission.⁷²

While this brief examination has not completely reflected the complexities of the internal government structures which deal with problems of racial and ethnic discrimination in Canada, India or Britain, it does demonstrate that while the United States Commission is not unique, it uniquely combines certain features—especially its permanence, power of subpoena, and duty to independently and impartially monitor the federal government.

VII. Need for an Independent Commission on Civil Rights

Nearly fourteen years after the establishment of the Commission on Civil Rights, it is certainly appropriate to ask whether there is still a need for an independent factfinding agency in this field. Although the answer to that question, of course, depends partly on one's view of the world as it was in 1957 and as it is in 1971, there is likely to be more dispute as to the need for political independence in such an agency than the need for factfinding per se. It seems obvious that the efficiency of any government operation is enhanced by adequate information on the subject of its actions. The fact that many people may say somewhat loosely that "the problems of minority people are well known" has not rendered irrelevant such studies as the Labor Department's survey of minority unemployment or census research on the extent of substandard housing occupied by minority persons.

However, whether a politically "independent" agency rather than a bureau of an executive department should be finding facts and making recommendations in this area is more debatable. In addition to the aforementioned tendency of racism to generate myths and falsehoods, there are two basic reasons why the Commission should continue to maintain as much independence as possible in the performance of its functions: one reason is that conditions have not changed radically since 1957, and the other reason, paradoxically, is that there have been some new developments which require independent evaluation.

Although there have been many changes and improvements in the condition of minorities since 1957, their relative position is still incompatible with the demands of equal justice. Moreover, progress is constantly threatened by reaction and repression. Any important change in the position of minorities constitutes a threat, real or imaginary, to some existing interest—whether it is white political control in Southern counties or craft union control in specific cities. Demands for change are likely to be resisted and to find their way into the arena of political controversy. Not only the demands, but also the reports which deal with them generate heated controversy. Although public debate quiets after a while, it is more often because of a loss of interest than because an acceptable political compromise has been worked out. The power of minority groups is not yet

parochial committee endeavouring to do good work through informal exhortations." Lasok, *Some Legal Aspects of Race Relations in the United Kingdom and the United States*, 16 J. OF PUB. L. 326, 341 (1967).

72 42 U.S.C. § 1975c(a)(4) (1964).

sufficient to obtain acceptable compromises on most issues. In fact, despite substantial progress in civil rights since 1957, a large number of justifiable demands by minorities have been successfully resisted by the majority population.

Under these conditions, the temptation for the executive branch to "play politics" with a Commission on Civil Rights is as present in 1971 as it was in 1957. Although there is nothing wrong with politics as such, our political system as set forth by the Constitution is based on the assumption that minority rights have to be placed beyond the reach of political decisions because in a power struggle they would inevitably be defeated. This assumption is still correct. Thus, it seems that the same considerations which have led the Commission to disobey such presidential inclinations as opposition to a report on Mississippi in 1963 still govern today.

The other rationale for Commission independence is that since 1957 a number of federal agencies have been established to deal with civil rights. The Commission has the duty to appraise them. Since they are subject to the same political conflicts that were mentioned above, such an appraisal can only be valuable if it is independent. Minority people, who are more likely to be poor than others, are particularly dependent upon government action and particularly vulnerable to ill-conceived or poorly administered policies. It is not inconceivable, of course, that as minority groups increase their power they will monitor federal action relating to their interests without need for an independent Commission to assist them. It seems, however, that that day has not yet arrived.

In describing the origins of the Commission, emphasis was given to how its independence was in a sense the bright side of another aspect of the Commission—its lack of enforcement powers.⁷³ The one advantage of lack of power is the possibility of independent judgment. The Commission should continue to exercise it.

During the brief life of the Commission, more than eighty percent of its legislative proposals to secure and enlarge civil rights have been successfully enacted into law. This is no mean accomplishment when one considers that prior to the 1957 legislation creating the Commission, the Congress had for eighty years passed no federal civil rights legislation. Many factors, other than Commission action, were responsible for this legislation, but the fact remains that the Commission assembled the facts and proposed corrective legislation.

While the Commission was a David facing the Goliath of big government, big business, big labor, or big prejudice, it has acted out of a deep conviction of the moral imperatives of our government to realize, in fact, the promises of our Constitution and Bill of Rights. When faced with difficult decisions, opposition from Presidents or Cabinet members or large industries was considered, but was ignored if it conflicted with the special kind of virtue that gave the legal independence of our agency—our *integer vitae*—a special efficacy and a convincing power in an area fraught with emotion, myth and, worst of all, prejudice. Somehow the legal weakness became endowed with moral strength and allowed the Commission, like David, to emerge victorious.

⁷³ This shortcoming which arose as a result of a political inability to create a stronger body is still being repeated in other organizations, as is shown by the struggle over the EEOC's cease and desist powers and the limited appropriations made available to HUD to enforce open housing.